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Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

Thomas Charles Kleve, *Petitioner,*

v.

D. R. Hill, Warden CCI; J. Gomez; Daniel E. Lundgren, Attorney General of the State of California, *Respondents.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

At trial, Petitioner was acquitted of conspiracy to commit first degree murder and convicted of conspiracy to commit second degree murder. The Supreme Court of California later held there was no crime of conspiracy to commit second degree murder at the time of Petitioner's conviction. Denying habeas relief, the Ninth Circuit held the conviction of conspiracy to commit second degree murder was the "functional equivalent" of conspiracy to commit first degree murder. The United States Supreme Court granted certiorari and remanded in light of *Fiore v. White*, 531 U.S. 225 (2001). The Ninth Circuit again denied habeas relief.

1. Whether the Due Process Clause permits a defendant to be convicted of a non-existent crime on the grounds that it is the "functional equivalent" of a real crime, even though the defendant was expressly acquitted of that real crime in the very same proceeding?

2. Whether the Due Process Clause permits a defendant to be convicted of conspiracy to commit first degree murder when the jury determined the required mental states of premeditation and deliberation were not proved beyond a reasonable doubt?

3. Should this Court resolve the conflict between the Ninth Circuit and the Fifth and Eleventh Circuits on the important Due Process issue of whether a conviction for a nonexistent crime can support a criminal conviction and life sentence?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Ninth Circuit were as follows:

Appellants: D. R. Hill, Warden CCI; J. Gomez; Daniel E. Lundgren, Attorney General of the State of California

Appellee: Thomas Charles Kleve, now confined in Soledad State Prison, Soledad, California.

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INTRODUCTION

Petitioner was convicted of conspiracy to commit second degree murder — a crime that did not exist at the time of his conviction. The Ninth Circuit denied habeas relief, holding that Petitioner must serve the rest of his 15 years to life sentence because his conviction is the "functional equivalent" of a conviction for the crime of conspiracy to commit first degree murder — *a crime of which he was expressly acquitted by jury*. Nine judges dissented from the full court's decision not to hear the case en banc.

The United States Supreme Court granted Petitioner's writ of certiorari, and later remanded the case to the Ninth Circuit in light of *Fiore v. White*, 531 U.S. 225, 121 S.Ct. 712 (2001). The Ninth Circuit again denied habeas relief, despite this Court's unequivocal statement that "[w]e have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Fiore*, 121 S.Ct. at 714.

In addition to its flagrant disregard of *Fiore*, this holding also places the Ninth Circuit in a square and irreconcilable conflict with *Adams v. Murphy*, 653 F.2d 224 (5th Cir., 1981), which is controlling authority in the Fifth and Eleventh Circuits. Though the facts were even less favorable in that case than here, the Court of Appeals did not hesitate to order the petitioner set fee.

Summary reversal or plenary review by this Court is urgently needed not only to free a man who has been wrongfully convicted and sentenced to life imprisonment for a nonexistent crime, but to validate the important Due Process principle that

"[n]owhere in this country" — not even in the Ninth Circuit — "can any man be condemned for a nonexistent crime." *Adams*, 653 F.2d at 225.

CITATIONS TO OPINIONS BELOW

The July 30, 1999, denial of Petitioner's pro per petition by the United States Court of Appeals for the Ninth Circuit is recorded at No. 97-56182 and reported at 185 F.3d 1009 (9th Cir. 1999) (Nelson, J., dissenting) (attached hereto as Appendix A).

A petition for rehearing en banc followed. The January 21, 2000, order denying rehearing and dissent is recorded at No. 97-56182 and reported at 202 F.3d 1155 (9th Cir. 2000) (Kozinski, J., dissenting) (attached hereto as Appendix B).

The order granting the petition for certiorari to the United States Supreme Court and remanding for reconsideration is recorded at No. 99-1688 and reported at 531 U.S. ___, 121 S.Ct. 851 (Mem.) (2001).

The March 16, 2001, denial of the habeas petition on reconsideration is recorded at No.97-56182 and reported at 243 F.3d 1149 (9th Cir. 2001) (Nelson, J., dissenting) (attached hereto as Appendix C).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § § 1254(1) and 2254(a).

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CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

1. Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no State shall deprive any person of due process of law.

2. Section 182 of the California Penal Code provides, in pertinent part, that the jury or judge convicting a defendant of conspiracy to commit a crime shall make a finding as to degree; failing that, the punishment shall be for the lesser degree; except in cases of murder, in which the punishment for conspiracy to commit murder shall be that prescribed for murder in the first degree.

CONCISE STATEMENT OF THE CASE

Petitioner's case began with a dispute between narcotics traffickers, none of whom were known to him. In July 1987, Mark Hallin was arrested for attempting to sell an undercover police officer three kilos of cocaine. (RT 125-126).[1] Mr. Hallin promptly informed on Richard Hildalgo, his supplier, who was then arrested and charged with selling cocaine. (RT 125-128) Charles Melonson, Renee Green, and Clinton Calley, Petitioner's co-defendant, were involved in the narcotics trade with Mark Hallin and Richard Hildalgo. (RT 222-226)

On September 30, 1987, at approximately 12:30 a.m., a Los Angeles County deputy sheriff in La Mirada stopped

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[1] "RT" refers to the Reporter's Transcript on Appeal, a copy of which was lodged with the Ninth Circuit.

petitioner's truck for expired registration tags. (RT 50-51, 84) When petitioner exited the truck, Deputy Garcia saw the passenger, Mr. Calley, with a street map on his lap and a shotgun in his jacket. (RT 52, 73, 78, 88-90, 93-95, 98-99) While searching the truck the deputy discovered a dagger in a sheath, a .9 millimeter pistol with several live rounds, and another magazine which had nine live rounds. A search of Petitioner revealed six .9 millimeter rounds. (RT 59-62, 64, 66-67, 82, 203-206, 209-211, 214-217) A search of Mr. Calley revealed a device, which, according to prosecution witnesses, could explode when attached to an ignition system. (RT 54, 56, 69-70, 79-80, 82, 100-101, 107, 169-172, 181-184)

During a booking search, deputies examined Mr. Calley's wallet. The wallet contained a note with the name and physical description of Mark Hallin, two non-existent addresses on Ramhurst Street (neither of which was Mr. Hallin's address, although he lived on Ramhurst Street), descriptions of Mr. Hallin's car, and the date of September 29, 1987. (RT 178-179, 189, 263-267)

At trial, Petitioner explained that during the day and early evening of September 29, 1987, he had been with his sister. After visiting their father in the hospital, they went shooting in the local hills. (RT 301) Petitioner left his gun case on the passenger side floorboard of his truck, and had several unused rounds in his pocket. (RT 269-279, 290-291, 295) The knife discovered in his truck had been a gift from his wife. (RT 293)

Petitioner said that after he returned to his home in Romoland, Riverside County, Mr. Calley arrived. (RT 289) He asked Petitioner's brother for a ride to La Mirada because

his truck was not running and he wanted to find a house or an apartment to rent. As a favor to his brother, Petitioner agreed to drive Mr. Calley. (RT 289) Petitioner knew Mr. Calley was carrying a shotgun. Mr. Calley told Petitioner he did not want to leave the shotgun in his truck because his truck "wouldn't lock up." (RT 291)

Petitioner testified he had no intention of killing Mr. Hallin or anyone else. (RT 288) Indeed, Petitioner had not even heard of Mr. Hallin, Ms. Renae Green, Mr. Richard Hildalgo, or Mr. Melonson. (RT 295) Petitioner knew of Mr. Calley only through his acquaintance with Petitioner's brother and a mutual friend. (RT 288, 295-297) Before his arrest, Petitioner had met Mr. Calley at most a half dozen times and did not consider him a friend. (RT 296)

Petitioner was charged with conspiracy to commit first degree murder, among other charges, and was tried with Mr. Calley. Petitioner was acquitted of one charge and convicted of two misdemeanors. The jury could not reach a verdict on the other charges, including the conspiracy charge. In the retrial, the trial judge sua sponte gave the lesser instructions of conspiracy to commit second degree murder, even though neither side requested lessers. (RT 380) Mr. Calley was convicted of conspiracy to commit first degree murder and other charges. (RT 441-442) Petitioner was acquitted of conspiracy to commit first degree murder and was convicted of conspiracy to commit second degree murder. (RT 441) He was subsequently sentenced to state prison where he remains to this day.

On January 5, 1996, Petitioner filed a pro per petition for a writ of habeas corpus, alleging, inter alia, that he was convicted of a nonexistent crime, to wit, conspiracy to

commit second degree murder. *See* Case # CV 96-0096 JSL (RNB). His petition was dismissed by the United States District Court on July 7, 1997. On August 25, 1997, the court granted Petitioner a certificate of probable cause and leave to appeal.

While the matter was pending in the United States Court of Appeals for the Ninth Circuit, the California Supreme Court decided *People v. Cortez*, 18 Cal.4th 1223 (1998), holding that at the time of Petitioner's conviction there was no crime of conspiracy to commit second degree murder in California. On March 26, 1999, Respondent was directed by the Ninth Circuit to address the applicability of *Cortez* to Petitioner's case.

On July 30, 1999, the Ninth Circuit affirmed the District Court's decision in *Kleve v. Hill*, 185 F.3d 1009 (9th Cir., 1999) (Nelson, J., dissenting). *See* App. A. The petition for rehearing en banc was denied on January 21, 2000 in *Kleve v. Hill*, 202 F.3d 1155 (9th Cir. 2000) (Kozinski, J., dissenting). *See* App. B.

A petition for certiorari was filed in the United States Supreme Court. *See* No. 99-1688. The petition was granted on January 16, 2001, and remanded for reconsideration. *See Kleve v. Hill*, 531 U.S. ___, 121 S.Ct. 851 (Mem.) (2001). The Ninth Circuit again denied habeas relief. *See Kleve v. Hill*, 243 F.3d 1149 (9th Cir. 2001); (Nelson, J., dissenting). *See* App. C.

REASONS FOR GRANTING THE WRIT

A. PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED WHEN HE WAS CONVICTED OF A NONEXISTENT CRIME.

At the time of Petitioner's conviction, "there [was] no crime of conspiracy to commit second degree murder under California law." *Kleve*, 185 F.3d at 1011-1012, *citing Cortez*, 18 Cal.4th at 1232, n 3, 1237-1238 (1998); *see also Kleve*, 243 F.3d at 1152 (Nelson, J., dissenting). The Ninth Circuit nonetheless found Petitioner's conviction for conspiracy to commit second degree murder to be lawful on two separate grounds. First, California law may have evolved since Petitioner's conviction, which would not allow him to benefit from the change of law; or, second, Petitioner's conviction for a non-crime is the "functional equivalent" of a real crime. Both arguments are wrong.

Cortez held there is no crime of conspiracy to commit second degree murder. The crime of conspiracy to commit murder is a unitary one, in which the necessary mental states of premeditation and deliberation can be inferred from the proof of the conspiracy. *See Cortez*, 18 Cal.4th at 1232, n 3, 1237-38. In *Cortez*, the jury convicted the defendant of conspiracy to commit murder without making any finding as to degree, but could not decide as to the substantive murder charge. *Id.*, at 1228. Instructions relating to premeditation and deliberation were given as to murder, but not as to conspiracy. *Id.*, at 1227. *Cortez* held separate instructions on premeditation and deliberation were not required because

> [t]he mental state required for conviction of conspiracy to commit murder necessarily establishes premeditation

> and deliberation of the target offense of murder — hence all murder conspiracies are conspiracies to commit first degree murder, so to speak.

Id., at 1232. "When a jury finds the existence of a conspiracy to commit express malice murder," wrote the majority, "it has thereby **necessarily determined** that the conspirators premeditated and deliberated the commission of said murder." *Id.*, at 1232, n 3 (emphasis added).

Before *Cortez* there was California Supreme Court dictum in *People v. Horn*, 12 Cal.3d 290, 298-300 (1974), that language in California Penal Code Section 189 and the then-recognized defense of diminished capacity supported such a crime as conspiracy to commit second degree murder. *See Cortez*, 18 Cal.4th at 1234; *People v. Swain*, 12 Cal.4th 593, 608 (1996). Subsequently, the California Supreme Court held Horn's discussion of the viability of the offense of conspiracy to commit second degree express malice murder to be mere dictum. *See Swain*, 12 Cal.4th at 606-607; *see also Cortez*, 18 Cal.4th at 1236 ("the plain fact remains that Horn's interpretation . . . was dictum.").

In 1981, the legislature not only amended Penal Code Section 189, removing the language at issue, but also abolished the defense of diminished capacity. *Id.*, at 1234. Thus, since at least 1981 whatever support had once existed for the dictum in *Horn* that California had a crime of conspiracy to commit second degree murder was gone. *Id.*, at 1234-1238. Petitioner's crime was committed in September 1987 — six years **after** the support for *Horn*'s dictum had vanished.

Thus, contrary to the suggestion by the Ninth Circuit, California law did not evolve. Years before Petitioner's

conviction there was no such crime as conspiracy to commit second degree murder.

Nevertheless, the Ninth Circuit found Petitioner's conviction for conspiracy to commit second degree murder to be the "functional equivalent" of a conviction for conspiracy to commit first degree murder. *See Kleve,* 243 F.3d at 1151; *Kleve,* 185 F.3d at 1014. The Ninth Circuit wrongly believed that "any defendant who satisfies the elements of conspiracy to commit second degree [murder] also satisfies the elements of conspiracy to commit first degree murder." *See Kleve,* 243 F.3d at 1151. According to the Ninth Circuit, "[t]he two kinds of conspiracy," i.e., conspiracy to commit first or second degree murder, are not identical, but rather " merely functional equivalents for purposes of punishment." *Ibid.*

This reasoning does not take into consideration that Petitioner's jury was instructed:

> [I]t could find Kleve guilty of either conspiracy to commit first degree murder or conspiracy to commit second degree murder. First degree murder, they were told, requires a showing of intent to kill with premeditation and deliberation whereas second degree murder requires only intent to kill. The jury acquitted Kleve of conspiracy to commit first degree murder, but convicted him of conspiracy to commit second degree murder. The only explanation for these verdicts is that the prosecution failed to prove premeditation and deliberation beyond a reasonable doubt.

Id., at 1152-1153 (Nelson, J., dissenting). The majority, claimed Judge Nelson, has "reverse engineered" a conviction:

> Faced with a not guilty verdict on the conspiracy to commit first degree murder charge, the majority fails to consider that acquittal and refashions the guilty verdict for a crime that does not exist into a conviction for an offense we know the jury believed was not proved beyond a reasonable doubt.

Id., at 1152 (Nelson, J., dissenting); *see Kleve,* 202 F.3d at 1159 (Kozinski, J., dissenting) (the defendant "may not be held liable on that same charge by using a conviction for a non-existent offense to override the verdict of acquittal").

Although relied upon by the *Kleve* majority, the language in *Cortez* that all conspiracies to commit murder are the "functional equivalent" of conspiracy to commit first degree murder simply does not apply to this case. Unlike *Cortez*, the jury in Petitioner's case *was* instructed on premeditation and deliberation and found that *none* was proven; and, again unlike *Cortez*, the jury *was* given the option of convicting Petitioner on conspiracy to commit first degree murder and expressly *acquitted* him of that charge.

A conviction based on a "theory of culpability that did not exist" violates due process. *See Suniga v. Bunnell*, 998 F.2d 664, 668 (9th Cir. 1993). Citing *Suniga*, Judge Nelson wrote that "a conviction for conduct that is not in fact a crime cannot be squared with the dictates of due process." *See Kleve,* 243 F.3d at 1153 (Nelson, J., dissenting), *citing with approval Adams v. Murphy*, 653 F.2d 224, 225 (5th Cir. 1981). Here Petitioner was convicted on a theory of culpability that does not exist in California — conspiracy to commit murder *without* premeditation and deliberation — *and* for something that is not a crime — conspiracy to commit second degree murder. This is expressly prohibited by the United States Constitution:

> Thus it is an assumption of our system of criminal justice 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' that no person may be punished criminally save upon proof of some specific illegal conduct.

See Schad v. Arizona, 501 U.S. 624, 633 (1991) (citations deleted).

The Due Process Clause of the Fifth and Fourteenth Amendments requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged." *In re Winship*, 397 U.S. 358, 364 (1970). The application to this case is self-evident. California recognizes only the crime of conspiracy to commit first degree murder, or, in other words, a conspiracy to commit murder in which *premeditation and deliberation* are proved beyond a reasonable doubt.

In Petitioner's case the jury believed premeditation and deliberation were *not* so proved. They were instructed, first, that they could not convict Petitioner of conspiracy to commit first degree murder if premeditation and deliberation were not so proved; and, second, that the difference between conspiracy to commit first degree murder and conspiracy to commit second degree murder "hinged on the presence or absence of premeditation and deliberation." *See Kleve*, 243 F.3d at 1153, n 1 (Nelson, J., dissenting); *Kleve*, 202 F.3d at 1157, 1159 (Kozinski, J., dissenting). They did not find premeditation and deliberation to be proved, and, following their instructions, they correctly acquitted petitioner of conspiracy to commit first degree murder while convicting him of the charge that did not require premeditation and deliberation — conspiracy to commit second degree murder. Thus, unlike *Cortez*, which held that proof of conspiracy to commit murder "necessarily equates with

an establishes" premeditation and deliberation, *see Cortez*, 18 Cal.4th at 1232-1233, n 3; here Petitioner's jury necessarily found that premeditation and deliberation were **not** proved and their conviction for conspiracy to commit second degree murder cannot permit an inference that those mental states were proved.

Petitioner is presently serving a life sentence because the Ninth Circuit believes his conviction for a nonexistent crime that does not require premeditation and deliberation is the "functional equivalent" of one that does. Due Process cannot permit such a blatant violation of constitutional principles. There is no other reported case in which the conviction of a non-existent crime was deemed the "functional equivalent" of a crime of which the defendant was *acquitted* in the very same proceeding.

B. THE NINTH CIRCUIT HAS REFUSED TO FOLLOW THIS COURT'S DECISION IN *POWELL*

The Ninth Circuit held that Petitioner's acquittal of conspiracy to commit first degree murder and his conviction of conspiracy to commit second degree murder can be excused as merely inconsistent verdicts. In order to recast Petitioner's acquittal into a conviction, the majority has extended the holding of *United States v. Powell*, 469 U.S. 57 (1984), far beyond what was ever intended by this Court.

Powell applies in cases involving inconsistent verdicts. The present verdicts were not inconsistent: the first jury hung because it could not determine beyond a reasonable doubt if Petitioner conspired to commit murder; the second jury was instructed that, given a reasonable doubt as to whether premeditation and deliberation were proved, it could return a

verdict of guilty on conspiracy to commit second degree murder. Rather than being a case of inconsistent verdicts, this is a case in which the Petitioner was acquitted of the real crime and convicted of the nonexistent crime, so there is truly no valid verdict of conviction at all.

There is, however, an inconsistency in this case. That inconsistency lies in the jury's verdict of acquittal on the charge of conspiracy to commit murder in the first degree and the Ninth Circuit's determination that Petitioner was, nevertheless, convicted of that crime. Dissenting from the denial of habeas relief on remand, Judge Nelson notes that "[t]he problem with the majority's analysis, however, is that the verdicts in Kleve's trial were **perfectly consistent** under the instructions as given; *Powell* is inapposite." *See Kleve,* 243 F.3d at 1154 (Nelson, J., dissenting).

The majority fails to apply *Powell* correctly. *Powell* applies "*where the jury is properly instructed* and nevertheless returns inconsistent verdicts"; in that case, the court will not question the validity of the inconsistent verdicts. *See Kleve,* 202 F.3d at 1158 (Kozinski, J., dissenting) (emphasis in original). Here the court erroneously instructed the jury that Petitioner could be convicted of conspiracy to commit murder without proof of premeditation and deliberation, and, in doing so, erroneously placed a nonexistent crime before them. The apparent inconsistency in the verdicts "was dictated by the erroneous and inconsistent instructions." *Ibid.* In this situation, "*Powell* requires that the jury's verdict of acquittal on the only lawful offense be respected, and that its verdict on a charge that does not constitute a crime be deemed null and void. The panel's opinion clearly misapplies *Powell.*" *Id.*, at 1159 (Kozinski, J., dissenting); *see also Kleve,* 185 F.3d at 1015, n. 2 (Nelson, J., dissenting) (emphasis in original) ("Rather than

the *petitioner* attempting to use the jury's acquittal on one charge to invalidate the conviction on another, here the *majority* uses Kleve's conviction on one charge to invalidate the acquittal on another charge.").

C. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE FIFTH AND ELEVENTH CIRCUITS AND WITH UNITED STATES SUPREME COURT PRECEDENT.

This case was remanded in light of *Fiore v. White*, 531 U.S. 225, 121 S.Ct. 712 (2001). In *Fiore* the defendant was convicted of a Pennsylvania statute prohibiting the operation of a hazardous waste facility without a permit. The defendant had a permit, but the Commonwealth "argued that Fiore had deviated so dramatically from the permit's terms that he nonetheless had violated the statute." *See Fiore*, 121 S.Ct. at 713. Following an opinion certifying a state-law question to the Pennsylvania Supreme Court, the state court determined that Fiore's conduct was not criminal. The United States Supreme Court held that, since Fiore had a permit, the basic element of not having a permit was not proved; and that "the Due Process Clause of the Fourteenth Amendment forbids a state to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Id.*, 121 S.Ct. at 714.

The Ninth Circuit completely fails to address the concerns raised in *Fiore*. Apparently, the Ninth Circuit interpreted the remand in light of *Fiore* as a sufficiency of the evidence question pursuant to *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). *See Kleve*, 243 F.3d at 1150-51. The majority describes how there was evidence from which the jury could have found proof beyond a reasonable doubt. *Ibid.* But this is completely irrelevant. Petitioner's jury expressly found there

was no premeditation and deliberation — which are required for conspiracy to commit murder under California law — and thus, just as with the failure to show that Fiore did not have a permit, the prosecution failed to show that Petitioner had the necessary mental states. In both cases an essential element was not proved; and, as in *Fiore*, the conviction here should be reversed.

In *Adams v. Murphy*, 653 F.2d 224 (5th Cir. 1981), the Fifth Circuit certified to the Florida Supreme Court the question of whether the crime of attempted perjury, of which petitioner had been convicted, was a crime under Florida law. When the state supreme court ruled that no such crime existed, the Fifth Circuit released the petitioner as "[n]owhere in this country can any man be condemned for a nonexistent crime." *Id.* at 224-225.

There are differences between Petitioner's case and *Adams*, but those differences actually help Petitioner. First, the error in *Adams* was invited by the defense; in Petitioner's case the error was based on the trial court's *sua sponte* instruction. Second, the *Adams* jury acquitted the defendant of perjury only implicitly; in Petitioner's case he was *explicitly* acquitted of conspiracy to commit first degree murder. *See Kleve*, 202 F.3d at 1159 (Kozinski, J., dissenting). Both the Ninth Circuit's original decision, and its decision following the remand, conflict with the Fifth *and* Eleventh Circuits. *Id.*, at 1160, n 5. *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc) (the holding in *Adams* and other former Fifth Circuit cases becomes law in both the Fifth Circuit and the then new Eleventh Circuit).

Essentially, *Kleve v. Hill*, 243 F.3d 1149 (9th Cir. 2001) holds that a defendant may be convicted of a nonexistent crime if that crime can be recast as the "functional equivalent" of a

crime of which he was *expressly acquitted* in the same proceeding. Under even less favorable facts, the Fifth Circuit held that "[n]owhere in this country can any man be condemned for a nonexistent crime." *See Adams*, 653 F.2d at 225; *see also Batiste v. Blackburn*, 786 F.2d 704, 706 (5th Cir. 1986) (following *Adams*). Petitioner there was ordered released. *Ibid.* Petitioner here should likewise be released.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari, and either summarily reverse the judgment below or set the case for plenary review.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS CHARLES KLEVE, Petitioner-Appellant,	)	
v.	)	No. 97-56182
D.R. HILL, Warden CCI; J. GOMEZ; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DANIEL E. LUNDREN, Attorney General, Respondent-Appellees.	)	D.C. No. CV-96-0096- JSL OPINION

Appeal from the United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Submitted April 16, 1999[1]
Pasadena, California

Filed July 30 1999

Before: Dorothy W. Nelson, Ferdinand F. Fernandez, William A. Fletcher, Circuit Judges.

Opinion by Judge William A. Fletcher;
Dissent by Judge D.W. Nelson

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[1] The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a).

COUNSEL

Thomas Charles Kleve, pro per, Tehachapi, California, petitioner-appellant.

Douglas L. Wilson, Assistant Attorney General, Los Angeles, California, for the respondents-appellees.

OPINION

W. FLETCHER, Circuit Judge:

Petitioner Thomas Charles Kleve appeals pro se from the district court's denial of his habeas petition under 28 U.S.C. § 2254. The central issue on appeal is whether petitioner was convicted of a non-existent crime when he was convicted in 1989 of conspiracy to commit second degree murder in violation of California Penal Code § 182. We have jurisdiction under 28 U.S.C. § 2253. We hold that petitioner's conviction was valid, and we affirm.

I.
BACKGROUND

On September 29, 1987, a Los Angeles County Sheriff's Department Deputy stopped petitioner's truck because it had an expired registration tag. As petitioner got out of the driver's side of the truck, the deputy saw that his passenger, Clinton Calley, had a street map open in his lap and a shotgun partially hidden in his jacket. A search of the truck revealed a case containing a dagger, a semi-automatic 9-millimeter pistol and two magazines containing live rounds that fit the pistol. A pat-down search of

petitioner revealed additional 9-millimeter live rounds. A pat-down search of Calley revealed an explosive device in his jacket pocket. During a post-arrest booking search, officers found a note in Calley's wallet with the name Mark Hallin, a physical description of Hallin, two non-existent addresses on Ramhurst Street (where Hallin lived, but at a different address), a description of Hallin's car and motorcycle, and the date September 29, 1987. The Sheriff's Department determined that the explosive device found in Calley's pocket could have been attached to the starter of Hallin's motorcycle and detonated when the motorcycle was started.

The Los Angeles District Attorney charged petitioner with conspiracy to commit first degree murder; transporting a destructive device; possession of a silencer; carrying a loaded firearm; and permitting a loaded firearm in a vehicle. At petitioner's first trial, a jury found him not guilty of possession of a silencer, but guilty of two misdemeanor counts of carrying a loaded firearm and two misdemeanor counts of permitting a loaded firearm in a vehicle. The jury was unable to reach a verdict on the remaining charges.[2] Following retrial, a second jury found petitioner not guilty of conspiracy to commit first degree murder, but guilty of conspiracy to commit second degree murder in violation of California Penal Code § 182.

Petitioner unsuccessfully challenged his conviction on direct appeal and in several state habeas petitions. Following dismissal of prior federal habeas petitions for failure to exhaust, petitioner filed this petition in 1996. The district court denied the petition. This appeal followed. We review de novo the

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[2] Clinton Calley was convicted by the same jury of conspiracy to commit first degree murder, possession a destructive device, and transportation of a destructive device.

district court's denial. *See Eslaminia v. White*, 136 F.3d 1234, 1236 (9th Cir. 1998).

II.
DISCUSSION

A. *Petitioner's Claim that He Was Convicted of a Nonexistent Crime*

At the time of petitioner's conviction in 1989, California Penal Code § 182 provided that when two people conspire to commit a felony

> they shall be punishable in the same manner and to the same extent as is provided for the punishment of that felony. *If the felony is one for which different punishments are prescribed for different degrees, the jury or court which finds the defendant guilty thereof shall determine the degree of the felony defendant conspired to commit. If the degree is not so determined, the punishment for conspiracy shall be that prescribed for the lesser degree, except in the case of conspiracy to commit murder, in which case the punishment shall be that prescribed for murder in the first degree.*

Cal. Penal Code § 182 (italics indicate language added in 1955). The California Supreme Court held last year, in *People v. Cortez*, 18 Cal. 4th 1223 (1998), that there is no crime of conspiracy to commit second degree murder under California law: "[A]ll conspiracy to commit murder is necessarily conspiracy to commit premeditated and deliberated first degree murder, and . . . all murder conspiracies are punishable in the same manner as murder in the first degree pursuant to the punishment provisions of Penal Code section 182. " *Id.* at 1237-

38. Relying on *Cortez*, petitioner contends that conspiracy to commit second degree murder was not a crime under California law at the time of his conviction.

[1] There are two possible responses to petitioner's contention. First, we could conclude that California law has evolved since the time of petitioner's conviction. Under this conclusion, the California Supreme Court's decision in *Cortez* states the law now, but it does not accurately describe the law when petitioner was convicted. In that event, petitioner's case is relatively straightforward. California is free to change its criminal law prospectively without undermining the validity of convictions obtained under the old law. *See Pulley v. Harris*, 465 U.S. 37, 42 (1984) (holding a claim based on evolution of state law is a matter of state law properly addressed to the state courts); *Wainwright v. Stone*, 414 U.S. 21, 23-24 (1973) (holding Florida not constitutionally compelled to make a new construction of criminal statute retroactive); *La Rue v. McCarthy*, 833 F.2d 140, 142-43 (9th Cir. 1987) (finding no due process violation where the California Supreme Court changed the felony-murder rule after petitioner's conviction became final); *see also Fiore v. White*, 149 F.3d 221, 224-26, n. 4 (3d Cir. 1998) (holding state courts not required to apply new statutory interpretation retroactively even where new interpretation was announced in a co-defendant's case), *cert. granted*, _____ U.S. _____, 119 S. Ct. 1332 (1999). Thus, if *Cortez* is an evolution of California law, petitioner cannot successfully attack his conviction based on an argument that conspiracy to commit second degree murder was not a crime when he was convicted.

[2] Second, we could conclude that California law has not evolved and that the law stated by the California Supreme Court in *Cortez* in 1998 was also the law in 1989. Although the

matter is not free from doubt, there is some basis for that conclusion. We know that conspiracy to commit second degree murder was not a crime in California in 1940. *See People v. Kynette*, 15 Cal. 2d 731, 744 (1940), *overruled on other grounds, People v. Snyder*, 50 Cal. 2d 190, 197 (1958). In 1940, the relevant punishment language of § 182 provided:

> When [two or more persons] conspire to commit any felony . . . they shall be punishable in the same manner and to the same extent as in this code provided for the punishment of the commission of the said felony[.]

Cal. Penal Code § 182, as amended by Stats. 1919, ch. 125, § 1, p. 170. Interpreting that language, the California Supreme Court in *Kynette* held that

> a conspiracy to commit murder can only be a conspiracy to commit murder of the first degree for the obvious reason that the agreement to murder necessarily involves the `willful, deliberate, and premeditated' intention to kill a human being.

15 Cal. 2d at 745.

In 1955, the California legislature added two sentences to the punishment language of § 182. Those sentences, which remain in the statute today, provide:

> If the felony is one for which different punishments are prescribed for different degrees, the jury or court which finds the defendant guilty thereof shall determine the degree of the felony defendant conspired to commit. If the degree is not so determined, the punishment for conspiracy shall be that prescribed for the lesser degree,

> except in the case of conspiracy to commit murder, in which case the punishment shall be that prescribed for murder in the first degree.

Cal. Penal Code § 182, as amended by Stats. 1955, ch. 660, § 1, p. 1155. Nearly twenty years later, the California Supreme Court in dictum interpreted the added language as establishing the crime of conspiracy to commit second degree murder. *See People v. Horn*, 12 Cal. 3d 290 (1974). In a footnote, the *Horn* Court stated:

> Kynette's assertion that a conspiracy to commit murder is always a conspiracy to commit first degree murder is inconsistent with the present language of Penal Code section 182 . . . . As [the] language [of § 182] is written and punctuated, it plainly authorizes the trier of fact to return a verdict finding conspiracy to commit murder in the second degree. Only if the trier of fact fails to determine the degree is a conspiracy to commit murder punished as one to commit first degree murder. Since the Legislature has authorized a verdict of conspiracy to commit second degree murder, it clearly does not believe that crime to be a logical impossibility.

12 Cal. 3d at 298, n. 5.

[3] The California Supreme Court did not interpret the two new sentences of § 182 again until its recent decisions in *People v. Swain*, 12 Cal. 4th 593 (1996), and, two years later, in *Cortez*. In *Swain*, the Court hinted that there was no crime of conspiracy to commit second degree murder, but the *Horn* dictum was not explicitly repudiated until *Cortez*. The Court in *Cortez* concluded that the two sentences added to § 182 in 1955

> [were] not intended to authorize the substantive offense of conspiracy to commit second degree express malice murder, and [were] intended instead to codify [the] holding in Kynette by acknowledging that all murder conspiracies are the functional equivalent of conspiracy to commit premeditated first degree murder[.]

18 Cal. 4th at 1236 n. 5. The Court in *Cortez* did not specify whether its interpretation of § 182 is to be applied retroactively. For purposes of the analysis that follows, we assume that *Cortez* is retroactive and that conspiracy to commit second degree murder was not a crime at the time of petitioner's conviction.

[4] All murder under California law requires "malice aforethought," which includes an "intent to kill." First degree murder requires premeditation and deliberation, while second degree murder is characterized by the absence of premeditation and deliberation. Under *Cortez*, any conspiracy to commit murder is treated as if it were a conspiracy to commit first degree murder. According to *Cortez*, conspiracy is a "specific intent" crime requiring both "an intent to agree or conspire and a further intent to commit the target crime or object of the conspiracy." *Id.* at 1232. Even though the "target crime" in *Cortez* was murder, the jury in that case was never instructed that it needed to find premeditation and deliberation in order to convict. The Court in *Cortez* held that so long as the jury found specific intent to conspire to commit murder, the mental state necessary for conspiracy was sufficient to justify treating any conspiracy to commit murder as the equivalent of conspiracy to commit first degree murder. The Court explained:

> [I]t logically follows that where two or more persons conspire to commit murder--i.e., intend to agree to conspire, further intend to commit the target offense of

> murder, and perform one or more overt acts in furtherance of the planned murder--each has acted with a state of mind "functionally indistinguishable from the mental state of premeditating the target offense of murder." The mental state required for conviction of conspiracy to commit murder necessarily establishes premeditation and deliberation of the target offense of murder--hence all murder conspiracies are conspiracies to commit first degree murder, so to speak. More accurately stated, conspiracy to commit murder is a unitary offense punishable in every instance in the same manner as is first degree murder under the provision of Penal Code section 182.

Id. at 1232 (citations omitted).

[5] We believe that the most plausible interpretation of *Cortez*, as applied to petitioner's case, is that petitioner was validly convicted of conspiracy to commit murder under California law but was punished more leniently than *Cortez* contemplates. In convicting petitioner of conspiracy to commit second degree murder, the jury found that petitioner (1) intended to agree to commit murder, and (2) had the required mental state--malice aforethought--to commit the target crime of murder. Under *Cortez*, this is all that is required for a conviction for conspiracy to commit murder under California law. Thus, because the jury found that petitioner had conspired to commit murder, his conspiracy was the equivalent under *Cortez* of conspiracy to commit first degree murder and was punishable as if he had committed first degree murder. In fact, however, petitioner was punished not as if he had committed first degree murder, but rather as if he had committed second degree murder. Thus, under *Cortez*, there was an error in petitioner's sentencing, but the error worked for rather than

against petitioner.

[6] Petitioner could argue that his acquittal on the charge of conspiracy to commit first degree murder is inconsistent with a conviction for what, under *Cortez*, is the only crime for which he could have been convicted--the unitary crime of conspiracy to commit murder. It is true that petitioner's acquittal necessarily means that the jury found he did not premeditate and deliberate with respect to the target crime of murder. This does not mean, however, that petitioner could not be convicted of what, under *Cortez*, is treated as conspiracy to commit first degree murder. This is so for either of two reasons.

[7] First, we may understand the acquittal on the more serious charge and the conviction on the less serious charge simply as inconsistent verdicts. *United States v. Powell*, 469 U.S. 57, 64-68 (1984), holds that an inconsistent verdict is not invalid; it is simply inconsistent. Second, and alternatively, we may understand the two verdicts as consistent. Though the opinion is not free from ambiguity, *Cortez* can be read to hold not that all conspiracy to commit murder is, in fact, conspiracy to commit first degree murder, but rather that it may be treated for purposes of punishment as the equivalent of conspiracy to commit first degree murder. Under this reading of *Cortez*, the jury's acquittal on the charge of conspiracy to commit first degree murder--i.e., its finding that petitioner did not conspire to murder with premeditation and deliberation of that murder--is neither here nor there. That is, under this reading, petitioner's crime was not actual conspiracy to commit first degree murder, but rather its functional equivalent. In the words of the California Supreme Court, it was conspiracy to commit first degree murder, "so to speak." *Cortez*, 18 Cal. 4th at 1232.

[8] We therefore conclude that, even if *Cortez* states the law of California as it has been since the *Kynette* decision in 1940, petitioner was convicted of a crime under California law The court in 1989 called petitioner's crime conspiracy to commit second degree murder, even though *Cortez* tells us today that his crime was conspiracy to commit first degree murder or its equivalent. The court in 1989 also punished petitioner's crime as if it had been a conviction for second degree murder, even though *Cortez* tells us today that it should have been punished as a conviction for first degree murder. But we do not believe that mislabeling petitioner's crime and punishing him with undeserved leniency provide a basis for invalidating his conviction altogether.

B. *Petitioner's Other Claims*

Petitioner has raised a number of additional claims, none of which depend on his argument under *Cortez* that he was convicted of a non-existent crime. In a separate unpublished memorandum, we affirm the district court's decision denying these claims.

For the foregoing reasons, the district court's denial of the petition is AFFIRMED.

D.W. NELSON, Circuit Judge, Dissenting:

I respectfully dissent because the majority's opinion essentially finds Kleve guilty of a crime for which the jury acquitted him. Given the jury's acquittal on the conspiracy to commit first degree murder charge and the California Supreme Court's determination that conspiracy to commit second degree murder was not a crime at the time of Kleve's conviction, we

have no choice but to reverse Kleve's conviction for second degree murder.

I agree with the majority that "there is no crime of conspiracy to commit second degree murder under California law." In California, only the legislature is authorized to make con duct criminal. *See People v. Mutch*, 4 Cal. 3d 389, 394 (1971); *People v. Smith*, 57 Cal. App. 4th 1470, 1480-81 (1997); *see also Bousley v. United States*, 118 S. Ct. 1604, 1610 (1998) (stating that the same principle applies in the federal system). Whether conspiracy to commit second degree murder is a crime therefore must be determined by the terms of California Penal Code § 182. The mistaken dictum by the *Horn* court, which stated that conspiracy to commit second degree murder is a crime, did not change the nature of the law because the California legislature never intended to authorize such a crime when it enacted and amended § 182. *See People v. Cortez*, 18 Cal. 4th 1223, 1232 n.3, 1236 (1998). Because *Cortez* establishes that the legislature did not provide for a crime of conspiracy to commit second degree murder at the time of Kleve's conviction, we are not presented with the question of whether a state must retroactively apply changes in its criminal law.

As I see it, this should be the end of the analysis. Just as we held that a conviction that could have been based on a "theory of culpability that did not exist" violated due process in *Suniga v. Bunnell*, 998 F.2d 664, 668 (9th Cir. 1993), a conviction for something that is not in fact a crime cannot be squared with the dictates of due process. Such a situation "raises the specter of fundamental unfairness. " *Id.*; *see also Bousley*, 118 S. Ct. at 1610 (noting that habeas review can be used to correct situations in which a defendant was convicted under an erroneous interpretation of a statute and, consequently,

"convicted of an act that the law does not make criminal") (internal quotation marks and citation omitted).[1]

The majority, however, after acknowledging that conspiracy to commit second degree murder -- the only crime for which Kleve was convicted -- is not a crime under California law, embarks on some form of harmless error-like review that allows it to recast Kleve's conviction as a conviction for conspiracy to commit first degree murder. The inescapable problem with this inquiry is that the jury acquitted Kleve of conspiracy to commit first degree murder. It is well established that the Constitution reserves the determination of guilt to the jury. *See Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). In interpreting the jury's second degree conviction as the "functional equivalent" of a first degree conviction, the majority erroneously supplants the jury's clear decision to acquit Kleve of the first degree charge.

First, the jury's verdict, when viewed in light of the jury instructions, indicates that it found insufficient evidence to convict Kleve of the first degree charge. The jury instructions explicitly distinguished between first and second degree murders and limited the circumstances under which the jury could convict Kleve of the second degree charge. We must assume that the jury, in acquitting Kleve of the first degree charge and convicting him of the second degree charge, followed its

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[1] We reached a consistent result in another context when the Supreme Court concluded that 8 U.S.C. § 1326(b)(2) makes the existence of a prior aggravated felony conviction a sentencing factor, but that the statute does not create a separate criminal offense. *See United States v. Almendarez-Torres*, we consistently reversed § 1326(b) convictions because defendants convicted of violating § 1326(b) had been convicted of something that is not a crime. *See, e.g., United States v. Alviso*, 152 F.2d 1195, 1199-1200 (9th Cir. 1998).

instructions. *See Jones v. United States*, 1999 WL 401258, at *11 (June 21, 1999).

As *Cortez* indicates, the jury instructions here were internally inconsistent.[2] The jury instructions explained that, in order to convict Kleve of conspiracy to commit murder, the jury had to make the threshold determination that Kleve possessed "malice aforethought." Further, in order to convict Kleve of conspiracy, the jury had to find the "specific intent to agree to commit the public offense of murder. " The *Cortez* court explained that this specific intent determination constitutes a finding of premeditation and deliberation. *See Cortez*, 18 Cal. 4th at 1232.

In Kleve's case, the jury was instructed that it next had to determine the degree of the murder. The jury was instructed that a "deliberate and premeditated killing" is "murder of the first degree." However, the jury was instructed that, if "the evidence is insufficient to establish deliberation and premeditation," it should deem the murder to be second degree. The instructions also specifically cautioned the jury that "if you have a reasonable doubt whether such murder was of the first or of the second degree, you must give the defendant the benefit of

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[2]Because the error here was in the formulation of the jury instructions, we do not have a situation of alleged "inconsistent verdicts." Kleve is not seeking to attack his second degree conviction on the basis that it cannot be reconciled with the jury's acquittal on the first degree charge, which is a very different situation that was addressed by the Supreme Court in United States v. Powell, 469 U.S. 57, 65 (1984). Kleve's argument for vacating the second degree acquittal has nothing whatsoever to do with the first degree charge. Simply put, he was convicted of something that is not a crime. Rather than the petitioner attempting to use the jury's acquittal on one charge to invalidate the conviction on another, here the majority uses Kleve's conviction on one charge to invalidate the acquittal on another charge.

that doubt and return a verdict fixing the murder as of the second degree." The majority relies solely on the jury's finding that Kleve possessed the requisite mental state for conspiracy, which, *Cortez* indicates, "necessarily establishes premeditation and deliberation." *Id.* at 1232. But the Supreme Court has "cautioned that instructions must be evaluated not in isolation but in the context of the entire charge." *Jones*, 1999 WL 401258, at *10. The majority thus errs in attempting to minimize the jury's contrary finding: at the same time that the jury determined that Kleve had con spired, it necessarily found the evidence of premeditation and deliberation to be lacking.

We know from *Cortez* that the jury could not have believed that Kleve acted on the basis of a "mere unconsidered and rash impulse," because the specific intent inherent in a conspiracy finding logically cannot be reconciled with the sort of rash actions that form the basis for a second degree murder conviction. *See* 18 Cal. 4th at 1232. There is also absolutely no factual basis for a conclusion that Kleve had insufficient time to premeditate because Kleve and Calley were driving around for approximately three hours. Moreover, the type of murder alleged here -- a contract killing -- is not susceptible to the sort of rash decision that can result in a second degree murder conviction. Therefore, based on the jury instructions, the jury must have found that there was insufficient evidence of deliberation and premeditation or, in other words, that it harbored a reasonable doubt whether the conspiracy to commit murder was of the first degree. I thus find remarkable the majority's conclusion that Kleve actually benefitted from the jury's "undeserved leniency" because he should have been convicted of conspiracy to commit first degree murder. The fact remains that he was not convicted of the first degree charge, and the jury instructions plainly indicate why.

The jury's conclusion is also supported by the evidence presented at trial, which was fairly weak as to Kleve. The evidence against Kleve amounted to little more than Kleve's presence in a car with the obviously-culpable Calley and his unlikely alibi that they were searching for an apartment for three hours. *Compare United States v. Wiseman*, 25 F.3d 862, 865 (9th Cir. 1994) (reversing conspiracy conviction of driver of car that was loaded with marijuana, despite strong odor of marijuana in car). "The inferences arising from keeping bad company are not enough to convict a defendant for conspiracy." *United States v. Ramos-Rascon* , 8 F.3d 704, 711 (9th Cir. 1993); *see also Wiseman*, 25 F.3d at 865 ("Mere casual association with conspiring people is not enough."). Because of Kleve's improbable explanation, the evidence may have been barely sufficient to sustain a first degree conviction.[3] Even so, it remains true that "the only evidence submitted by the government is wholly susceptible to innocent explanations." *Wiseman*, 25 F.3d at 867. In light of the entirely circumstantial and not very substantial evidence, it is not surprising that the jury was unable to conclude beyond a reasonable doubt that Kleve had expressly agreed to commit first degree murder. Moreover, it is noteworthy that this was the second jury that failed to convict Kleve; the first jury deadlocked on the conspiracy to commit murder charge.

Second, I disagree with the majority's suggestion that malice aforethought and the specific intent to conspire form a

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[3] In light of my conclusion that we must reverse Kleve's conviction because it is for a crime that does not exist under California law, I see no need to resolve the sufficiency of the evidence question. Although we might have upheld a first degree conviction if it had occurred, because it did not in fact occur, we lack the authority to recast the second degree conviction as a first degree conviction.

sufficient basis for a conspiracy to commit murder conviction. *Cortez* does not fully resolve the case before us because the issue presented there was whether the trial court properly refused to give a jury instruction on second degree murder. *See* 18 Cal. 4th at 1238. The *Cortez* court held that the trial court acted properly because all conspiracy to commit murder is first degree murder. *See id.* at 1232. The critical difference between this case and *Cortez* is that, in *Cortez*, there was no second degree murder instruction to create conflict with the conspiracy instruction. The *Cortez* majority could thus rely on the jury's uncontraverted specific intent finding made in the conspiracy context.

Therefore, that the *Cortez* court deemed sufficient jury instructions that required a finding of malice aforethought but did not specifically mention premeditation or deliberation is not dispositive. The malice aforethought instruction was adequate only because the jury had already made the necessary finding of premeditation and deliberation in adjudging the defendant guilty of conspiracy. *See id.* The *Cortez* court expressly repudiated the dissent's argument that the court was lowering the state of mind required to convict a person of conspiracy to commit murder. "We are not concluding [that] conspiracy to commit murder requires only intent to kill[4] -- we are instead merely recognizing that the mental state required for conspiracy to commit express malice murder *necessarily equates with and establishes the mental state of deliberate and premeditated first degree murder.*" *Id.* at 1232 n.3 (emphasis added). Therefore, in order to affirm Kleve's conviction we must, at a minimum, be able to say with confidence that the jury found that he had the necessary mental state of deliberation and premeditation. Yet the jury

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[4] The jury instructions given in Kleve's case defined malice aforethought as "an intention unlawfully to kill a human being."

instructions, when read in their totality, vitiate any such finding. We have no way of resolving the conflict between the jury's antithetical findings that Kleve had the specific intent necessary for conspiracy and that there was insufficient evidence or a reasonable doubt regarding whether he acted with deliberation and premeditation. As we stated in *Suniga*,"we cannot assume that the jury simply ignored the [erroneous] instruction." 998 F.2d at 669.

Given this uncertainty, we definitely cannot say, beyond a reasonable doubt, that the jury found the necessary elements for a first degree conviction. *Cf. Neder v. United States*, 1999 WL 373186, at *7 (Feb. 23, 1999) (setting forth the standard for harmless error review).[5] The equivocal tone of the majority opinion attests to this fact. Indeed, I cannot imagine what more the jury could have done to indicate that it found the evidence on the first degree charge to be lacking. Given the jury's decision to acquit on the first degree charge and *Cortez*' holding that conspiracy to commit second degree murder is not a crime, I cannot agree with the majority's affirmance of Kleve's second degree conviction. The majority not only usurps a proper jury function, but also relies on faulty guesswork in concluding that Kleve "could" have been convicted of the first degree charge. The Constitution "requires more than appellate speculation about a hypothetical jury's action . . . it requires an actual finding of guilt." *Sullivan*, 508 U.S. at 280.

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[5] Of course, harmless error analysis does not apply here because the presupposition of that doctrine is that there was an actual conviction. As I have stated, the jury's decision to acquit Kleve of the only valid crime for which he was charged should end the inquiry. The majority nonetheless undertakes a speculative inquiry that it does not term harmless error analysis but seems to be the "functional equivalent."

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS CHARLES KLEVE, Petitioner-Appellant,	)
	) No. 97-56182
D.R. HILL, Warden CCI; J. GOMEZ; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DANIEL E. LUNDREN, Attorney General, General, Respondent-Appellees.	) D.C. No. CV-96-0096-JSL) ORDER DENYING) DENYING) REHEARING) AND DISSENT

Filed January 25, 2000

Before: Dorothy W. Nelson, Ferdinand F. Fernandez, and William A. Fletcher, Circuit Judges.

The ORDER DENYING REHEARING with DISSENT, filed January 21, 2000, is hereby redesignated FOR PUBLICATION.

A judge of the court called for a vote on the petition for rehearing en banc. A vote was taken, and a majority of the active judges of the court failed to vote for en banc rehearing. Fed. R. App. P. 35(f).

The petition for rehearing and the petition for rehearing

en banc are DENIED.

KOZINSKI, Circuit Judge, with whom Chief Judge HUG and Judges PREGERSON, REINHARDT, HAWKINS, THOMAS, McKEOWN and FISHER join, dissenting from the order denying the petition for rehearing en banc:

Count I of the information charged petitioner Thomas Kleve with conspiracy "to commit the crime of 1st degree murder, in violation of Section 187 of the Penal Code, a felony . . . ." Of this, the jury acquitted him:"We, the Jury in the above-entitled action, find the Defendant Thomas Charles Kleve not guilty of conspiracy to commit a crime of murder of the first degree, in violation of Penal Code Section 182(1), a Felony as charged in Count I of the information. " Kleve has nevertheless spent the last ten years in prison. Why? Because the jury convicted him of conspiracy to commit murder in the *second* degree, which the trial judge believed was a lesser included offense. But, as we now know, "there is no crime of conspiracy to commit second degree murder under California law . . . ." *Kleve v. Hill*, 185 F.3d 1009, 1011 (9th Cir. 1999) (*citing People v. Cortez*, 18 Cal.4th 1223, 1237-38 (1998)). So Kleve has spent a decade in prison convicted of something that is not a crime.

The panel nevertheless abandons Kleve to his 15-years-to-life sentence on the theory that the jury convicted him of the "functional equivalent" of conspiracy to commit first degree murder--the very crime of which the jury *acquitted* him. *Kleve*,

185 F.3d at 1014.[1] This conclusion is nothing short of bizarre. A criminal defendant cannot be imprisoned unless the jury finds beyond a reasonable doubt every element of something that is in fact a crime. If the jury finds defendant "guilty" of something that is not a crime, he must go free. If the jury finds that an element of an actual crime was not proved beyond a reasonable doubt, again, the defendant must go free. Here, both circumstances are present: The jury found Kleve guilty of conspiracy to commit second degree murder, which the California Supreme Court has said is not a crime. The jury simultaneously acquitted him of conspiracy to commit murder in the first degree, which must mean that it had a reasonable doubt about whether Kleve acted with deliberation and premeditation--a necessary element for conviction of conspiracy to commit murder.

We know that the jurors had doubts about deliberation and premeditation because they were instructed that deliberation and premeditation marks the boundary line between first degree murder and second degree murder: "Murder of the second degree is also[2] the unlawful killing of a human being with malice aforethought where there is manifested an intention unlawfully to kill a human being *but the evidence is insufficient to establish deliberation and premeditation.*" Trial Transcript

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[1] Adding insult to injury, the majority chides Kleve for not appreciating the "undeserved leniency" with which he was sentenced. *Kleve*, 185 F.3d at 1014. It is a strange kind of leniency that results in the imprisonment for life--and such is the likely consequence under California's current policies--of a man who has not been convicted of any crime.

[2] The word "also" in this instruction refers back to the definition of first degree murder. The court gave the jury no other definition of second degree murder.

at 365 (emphasis added). As Judge Nelson points out in her cogent dissent, the jury's determination that Kleve was not guilty of conspiracy to commit first degree murder but was guilty of conspiracy to commit second degree murder can only mean that it found that premeditation and deliberation had not been proven. *See Kleve*, 185 F.3d at 1016 (Nelson, J., dissenting). Yet, under California law, a defendant who acted without premeditation and deliberation cannot be guilty of violating Penal Code section 182(1). *See Cortez*, 18 Cal.4th at 1232. In finding Kleve guilty of a charge that expressly omitted any requirement of premeditation and deliberation, the jury convicted Kleve of a non-existent crime. It follows as night the day that Kleve is being held unlawfully and must be released.

The panel majority reaches the contrary conclusion by a chain of reasoning that defies common sense. It holds that his conviction on a count that expressly omitted premeditation and deliberation as an element requires the inference that the jury did in fact find that he acted with premeditation and deliberation. The California Supreme Court in *Cortez* did, indeed, hold that premeditation can be inferred from defendant's participation in a conspiracy. But the *Cortez* jurors were not separately instructed on first and second degree murder; nor did they acquit Cortez of conspiracy to commit murder in the first degree; nor did they convict him on the lesser (non-existent) charge which they had been told did not include deliberation and premeditation. The only clue to the jury's thinking as to Cortez's state of mind was its verdict that he was guilty of conspiracy. Under those circumstances, the California Supreme Court held that premeditation could be inferred. *See Cortez*, 18 Cal.4th at 1232.

In Kleve's case, by contrast, the jury was (mistakenly) instructed on first and second degree murder, and was told that

the difference between the two hinged on the presence or absence of premeditation and deliberation. It was also told-- as required by California law, *see Cortez*, 18 Cal.4th at 1232, *People v. Swain*, 12 Cal.4th 593, 602 (1996)--that to find defendant guilty it had to find *two separate* mental states: (1) "the specific intent to agree to commit the public offense of murder" and (2) "the further specific intent or mental state to commit such offense." Trial Transcript at 365-66. The jury was also thrice warned that it was required to give defendant the benefit of every doubt, particularly when it came to his state of mind:

> [Y]ou may not find the defendant guilty of the offense charged in Count I, unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required specific intent or mental state but (2) cannot be reconciled with any other rational conclusion.

Id. at 361 (emphasis added). And again:

> Also, if the evidence as to any such specific intent or mental state is susceptible to two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to the absence of the specific intent or mental state, you must adopt that interpretation which points to the absence of the specific intent or mental state.

Id. (emphasis added). And yet again:

> If you are convinced beyond a reasonable doubt that the crime of murder has been committed by defendant, but you have a reasonable doubt whether such murder was

> of the first or second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.

Id. at 365 (emphasis added).

Having been told that it was required to find two separate states of mind, one pertaining to the conspiracy and the other pertaining to the underlying crime itself, and having been cautioned to give defendant the benefit of all doubts, the jury's verdict acquitting Kleve of conspiracy to commit first degree murder is perfectly plausible: The jury found that he had agreed to the conspiracy, but it also found that he had not engaged in the kind of careful weighing and pondering that amounts to premeditation. In reaching this conclusion, the jury was guided by another instruction which emphasized that Kleve did not act with deliberation and premeditation unless he weighed the matter carefully:

> To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill.

Id. at 364.

In this case we cannot infer that "where two or more persons conspire to commit murder . . . each has acted with a state of mind `functionally indistinguishable from the mental state of premeditating the target offense of murder,' " *Cortez*, 18 Cal.4th at 1232 (*quoting Swain*, 12 Cal.4th at 608-09), for the simple reason that we may not infer something that is contrary to a specific jury finding. By acquitting Kleve of conspiracy to

commit first degree murder, the jury necessarily found that premeditation and deliberation was absent--or, at least, that there was a reasonable doubt.

Recognizing that the jury's acquittal of first degree murder presents a hurdle to its analysis, the majority shrugs it off as "simply inconsistent" with the jury's finding that Kleve agreed to a conspiracy. Citing *United States v. Powell*, 469 U.S. 57 (1984), the panel holds that we may ignore the inconsistency as merely an exercise of the jury's lenience. *See Kleve*, 185 F.3d at 1013. For the reasons explained above, I do not believe there is any inconsistency between the finding that Kleve participated in the conspiracy and the finding that he lacked premeditation; the jury simply made separate findings as to the two states of mind, as it was instructed to do.[3] But even if we assume that the two parts of the verdict are inconsistent, *Powell* does not apply.

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[3] The panel majority seems to assume that conspiracy to commit second degree murder is an oxymoron because no jury could find intent to conspire, yet conclude that the defendant lacked deliberation or premeditation. In fact, intent and premeditation are separate concepts; one can be inferred from the other, as the court did in *Cortez*, but they are not the same. Indeed, second degree murder is an intentional killing that is committed without deliberation and premeditation. *See* page 870 *supra*. A majority of the California Supreme Court at one time was of the view that conspiracy to commit second degree murder is possible, *see People v. Horn*, 12 Cal.3d 290, 298 n.5 (1974), and one member of that court still considers it so. *See Cortez*, 18 Cal.4th at 1245 (Kennard, J., dissenting). Of equal significance, we have recently held that conspiracy to commit second degree murder is a crime recognized under federal law. *See United States v. Croft*, 124 F.3d 1109, 1122-23 (9th Cir. 1997). In so doing, we followed the reasoning of the Fifth Circuit in *United States v. Chagra*, 807 F.2d 398 (5th Cir. 1986). Conspiracy to commit second degree murder may not be a crime under California law, but it is not a logical impossibility.

Powell holds that *where the jury is properly instructed* and nevertheless returns inconsistent verdicts, we will not question the validity of the guilty verdicts on some counts just because they are logically inconsistent with not guilty verdicts on other counts. *Powell* recognized that, in such a case, the jurors must have disregarded the instructions at some point in their deliberations, but "it is unclear whose ox has been gored" thereby. *Powell*, 469 U.S. at 65. There is no reason to presume the jury disregarded the instructions when it found the defendant guilty; it could just as easily have ignored the instructions when it found defendant innocent, exercising its power of nullification to show mercy. *Id.* Thus a verdict entered by a properly instructed jury will stand, despite any inconsistency with verdicts on other counts.

For Powell to apply, the jury must have been given a correct, consistent set of instructions. Powell does not apply to a case like Kleve's where the jury seems to have followed the instructions scrupulously: The court instructed it to determine whether there was a conspiracy, and the jury found that there was. The court also instructed the jury to determine whether the conspiracy was one to commit murder in the first or second degree, and the jury dutifully found that the conspiracy was one to commit murder in the second degree. Any inconsistency between those verdicts did not arise because the jury chose to exercise mercy by ignoring the judge's instructions. Rather, the inconsistency was dictated by the erroneous and inconsistent instructions.

Under these circumstances, we may not shrug off the jury's acquittal of conspiracy to commit first degree murder as inconsequential. Instead, we must presume that the jury followed the instructions it was given and found that Kleve did not act with premeditation and deliberation. As a jury finding

made pursuant to instructions given to it by the trial court, the determination that Kleve did not act with premeditation and deliberation is binding and cannot be ignored. Applied correctly to this case, *Powell* requires that the jury's verdict of acquittal on the only lawful offense be respected, and that its verdict on a charge that does not constitute a crime be deemed null and void. The panel's opinion clearly misapplies *Powell*.

Perhaps even more important, we must give the jury's verdict of acquittal the dignity to which it is entitled under the Constitution. Whether a jury properly follows the court's instructions or not, a verdict of acquittal is final and not subject to attack. It bars any other conviction on that same charge. Kleve was acquitted by a jury of the only lawful charge brought against him. He may not be held liable on that same charge by using a conviction for a non-existent offense to override the verdict of acquittal.

Faced with the identical question, the Fifth Circuit came to precisely the opposite conclusion as the panel in our case. In *Adams v. Murphy*, 653 F.2d 224 (5th Cir. 1981), the petitioner had been charged with perjury. At petitioner's request, the judge reluctantly gave an instruction on "'attempted perjury' as a lesser-included offense," and the jury found petitioner "'guilty of the lesser included offense of attempted perjury.'" *Id.* at 224. On federal habeas, the Fifth Circuit certified to the Florida Supreme Court the question of whether the crime of attempted perjury existed under Florida law. When the Florida Supreme Court responded that no such crime existed, *see id.* at 224-25 (*citing Adams v. Murphy*, 394 So.2d 411 (Fla. 1981)), the Fifth Circuit thought it self-evident that petitioner had to be released because"[n]owhere in this country can any man be condemned for a nonexistent crime." *Id.* at 225.

There are only two material differences between Kleve's case and Adams's. In Adams the error was invited by defense counsel, while in Kleve's case the trial court gave the instruction sua sponte based on the then-prevailing understanding of California law.[4] *See Horn*, 12 Cal.3d at 298 n.5 (stating in dicta that Penal Code section 182(1) authorized a verdict of conspiracy to commit second degree murder). Second, the jury in Adams's case acquitted him of perjury only implicitly, *see Adams*, 653 F.2d at 225, while in our case the jury acquitted Kleve of conspiracy to commit first degree murder explicitly. *See Kleve*, 185 F.3d at 1010. Both differences cut in Kleve's favor; it is impossible to reconcile our ruling in *Kleve* with the Fifth Circuit's ruling in *Adams*. The panel's opinion creates a square conflict with the Fifth Circuit.

In the end, Kleve's case can be viewed in one of two ways. The most straightforward--the one adopted by the Fifth Circuit in Adams--is to take the jury at its word: It found defendant guilty of a crime that the state supreme court now tells us does not exist, in which case Kleve is guilty of nothing and must be released at once. But the case could also be viewed in a slightly different way: The jury acquitted Kleve of conspiracy to commit first degree murder and thereby determined that he acted without premeditation and deliberation. Since the state supreme court has held that conspiracy to commit murder under section 182(1) necessarily involves premeditation and deliberation, this acquittal is res judicata as to an element of the offense and, again, Kleve must be released. What we may not do is ignore the jury's findings and substitute

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[4] After reading the jury instructions, the trial judge stated, "I'd like the record to reflect that as to the jury instructions, neither side requested lesser-included instructions as to Count I. . . .[T]he court sua sponte is indicating first and second degree [murder]."

our own suppositions for them. *See Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993).

Kleve was tried twice and both juries failed to convict him of conspiracy to commit murder in the first degree. As pointed out by Judge Nelson, this is doubtless because the evidence against Kleve was very weak. The first jury--which was not given the option of finding him guilty of conspiracy to commit murder in the second degree--hung. The second jury, given a choice between conspiracy to commit first and second degree murder, acquitted him of the former and convicted him of the latter. We may not guess what the jury would have done had it been properly instructed. *See, e.g., Neder v. United States*, 119 S. Ct. 1827, 1845 (1999) (Scalia, J., concurring in part and dissenting in part) ("It is not within the power of us Justices to cancel th[e] reservation [of criminal verdicts to the jury]--neither by permitting trial judges to determine the guilt of a defendant who has not waived the jury right, nor . . . by reviewing the facts ourselves and pronouncing the defendant without-a-doubt guilty."); *Carella v. California*, 491 U.S. 263, 268 (1989) (Scalia, J., concurring in the judgment) (noting that right to jury trial "is a structural guarantee that `reflects a fundamental decision about the exercise of official power--a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges' ") (*quoting Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)). The only thing we know for sure is that the crime of which the jury convicted Kleve does not exist under the law of California. California therefore has no authority to retain him in custody because "[n]owhere in this country can any man be condemned for a nonexistent crime." *Adams*, 653 F.2d at 225.

The panel's opinion adds a qualifier to this previously uncontroversial and incontrovertible proposition: "Nowhere--

except in the Ninth Circuit." Because the panel's ruling is at loggerheads with the most fundamental principles of due process, egregiously misapplies *United States v. Powell* and puts us in direct conflict with the Fifth Circuit,[5] I respectfully dissent from our court's failure to grant the petition for rehearing en banc.

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[5] Actually, since Adams is an opinion of the old Fifth Circuit, it also puts us in conflict with the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS CHARLES KLEVE, Petitioner-Appellant,	)	
v.	)	No. 97-56182
D.R. HILL, Warden CCI; J. GOMEZ; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DANIEL E. LUNDREN, Attorney General, Respondent-Appellees.	)	D.C. No. CV-96-0096- JSL OPINION

Appeal from the United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Filed March 16, 2001

Before: Dorothy W. Nelson, Ferdinand F. Fernandez, William A. Fletcher, Circuit Judges.

Opinion by Judge William A. Fletcher;
Dissent by Judge D.W. Nelson

COUNSEL

Thomas Charles Kleve, pro per, Tehachapi, California, petitioner-appellant.

Douglas L. Wilson, Assistant Attorney General, Los Angeles, California, for the respondents-appellees.

OPINION

W. FLETCHER, Circuit Judge:

The Supreme Court has granted certiorari, vacated and remanded for reconsideration in light of its decision in *Fiore v. White*, 121 U.S. 712 (2001). *See Kleve v. Hill*, 2000 WL 32463 (U.S.) (2001). For the reasons that follow, we believe that the Court's decision and rationale in *Fiore* do not affect the analysis in this case.

Fiore and a codefendant, Scarpone, were convicted in Pennsylvania state court of operating a hazardous waste facility without a permit. Both Fiore and Scarpone argued on appeal that they had committed no crime under Pennsylvania state law because they in fact had a permit, though they may have deviated from its terms. The Pennsylvania Supreme Court refused to hear Fiore's appeal, and his conviction became final. It then heard Scarpone's appeal and reversed his conviction, based on the argument that both Fiore and Scarpone had made.

Fiore was unsuccessful in obtaining a writ of habeas corpus in state court. On federal habeas, the Third Circuit denied relief on the ground that the Pennsylvania Supreme Court

had no obligation retroactively to apply its construction of the Pennsylvania hazardous waste statute, announced in Scarpone's appeal to Fiore's case. The United States Supreme Court, which heard Fiore's case on certiorari, was unsure whether the Pennsylvania Supreme Court's decision in Scarpone's appeal had announced a new rule of law in construing the statute. In response to a certified question, the Pennsylvania Court stated that its decision in Scarpone's appeal did not rest on a new construction of Pennsylvania law. *See Fiore v. White*, 562 Pa. 634, 747 A.2d 842 (2000).

Relying on this response, the Supreme Court reversed Fiore's conviction. Because a basic element of the crime under Pennsylvania law was operating a hazardous waste facility without a permit, and because Fiore indisputably possessed a permit, "the parties agree[d] that the Commonwealth [of Pennsylvania] presented no evidence whatsoever to prove that basic element." 121 S.Ct. at 714. The Supreme Court's decision rests on the well-established principle that the state must present sufficient evidence to prove each element of the crime with which a criminal defendant is charged. The requisite quantum of evidence for determining a challenge to a conviction on federal habeas corpus is specified in *Jackson v. Virginia*, 443 U.S. 307, 324 (1979): A petitioner "is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof beyond a reasonable doubt."

[1] There is nothing in our earlier decision in this case that is inconsistent with the Supreme Court's decision in *Fiore*. Petitioner Kleve was arrested by the police when he and a friend were found late at night, near the house of their would-be victim, in possession of a dagger, a semi-automatic 9-millimeter pistol, and an explosive device. At Kleve's 1989 trial, the jury

was given a then-standard instruction under California law. Depending on its view of the evidence, the jury was told it could find Kleve guilty of either conspiracy to commit first degree murder or conspiracy to commit second degree murder. *See People v. Horn*, 12 Cal.3d 290 (1974) (stating that conspiracy to commit second degree murder was a crime under California law). The jury acquitted Kleve of the former, but convicted him of the latter.

In 1998, nine years after Kleve's conviction, the California Supreme Court held that under California law there is no crime of conspiracy to commit second degree murder. *See People v. Cortez*, 18 Cal.4th 1223 (1998). On federal habeas, we sustained Kleve's conviction of conspiracy to commit second degree murder despite the California Court's decision in *Cortez*. We relied on two grounds, either one of which is sufficient to sustain the conviction.

[2] First, the Court's decision in *Cortez* may have changed California law. A change of law does not invalidate a conviction obtained under an earlier law. *See Pulley v. Harris*, 465 U.S. 37, 42 (1984); *Wainwright v. Stone*, 414 U.S. 21, 23-24 (1973); *La Rue v. McCarthy*, 833 F.2d 140, 142-43 (9th Cir. 1987).

[3] Second, even if *Cortez* did not change the law, Kleve was nonetheless properly convicted under its reasoning. The California Supreme Court held in *Cortez* that under California law there is no distinct crime of conspiracy to commit second degree murder, because any defendant who satisfies the elements of conspiracy to commit second degree also satisfies the elements of conspiracy to commit first degree murder. The Court wrote:

> The mental state required for conviction of conspiracy to commit murder necessarily establishes premeditation and deliberation of the target offense of murder — hence all murder conspiracies are conspiracies to commit first degree murder, so to speak. More accurately stated, conspiracy to commit murder is a unitary offense punishable in every instance in the same manner as is first degree murder [.]

18 Cal.4th at 1232 (citations omitted).

[4] When given a choice between the two crimes, Kleve's jury acquitted him of conspiracy to commit first degree murder, and convicted him of conspiracy to commit second degree murder. These two verdicts were consistent under the instructions the jury had been given, but they arguably became inconsistent after *Cortez*. Even if the verdicts are inconsistent under *Cortez*, Kleve's conviction may stand, for inconsistent verdicts are not invalid. *See United States v. Powell*, 468 U.S. 57, 64-68 (1984). But they are not even necessarily inconsistent, for *Cortez* may be read not as holding that the two kinds of conspiracy are identical, but, rather, that they are merely functional equivalents for purposes of punishment.

When we first decided this case a year and a half ago, we regarded it as difficult. One of our panel members dissented, see 185 F.3d 1009, 1014 (9th Cir. 1999) (D.W. Nelson, J., dissenting), and nine members of the court dissented from the full court's decision not to take the case en banc. *See Kleve v. Hill*, 202 F.3d 1155 (9th Cir. 2000). We regret that the Supreme Court's decision in *Fiore v. White* does not make it any less difficult. We knew when we decided this case in 1999 that a federal habeas petitioner is entitled to relief when the evidence fails to satisfy *Jackson v. Virginia*, and *Fiore* does no more than

to reiterate that principle.

[5] The issue in this case is not whether there was sufficient evidence to convict Kleve of conspiracy to commit first degree murder or its equivalent under *Jackson v. Virginia*. There was ample evidence to support such a conviction. The issue is whether under the federal Constitution the California Supreme Court's decision in *Cortez* is fatally inconsistent with petitioner Kleve's conviction. We continue to believe that it is not. The holding and rationale of *Cortez* may mean that Kleve's crime was mislabeled as conspiracy to commit second degree murder, and that Kleve was therefore sentenced with undeserved lenity, *Cortez* does not mean, however, that Kleve was convicted and sentenced in violation of the United States Constitution.

For the foregoing reasons we adhere to our previous decision in this case, and AFFIRM the decision of the district court.

D.W. NELSON, Dissenting:

Thomas Kleve was convicted in 1989 of conspiracy to commit second degree murder. Nine years later the California Supreme Court explained that, at the time of his conviction, there was no such crime under California law. *See People v. Cortez*, 18 Cal.4th 1223 (1998). It is now twelve years after he was convicted and Kleve remains in jail for a crime that does not exist. How is this possible? Because, according to the majority, Kleve was convicted of the "functional equivalent" of conspiracy to commit first degree murder — the very crime of which the jury acquitted him. Faced with a not guilty verdict on the conspiracy to commit first degree murder charge, the

majority fails to consider that acquittal and refashions the guilty verdict for a crime that does not exist into a conviction for an offense we know the jury believed was not proven beyond a reasonable doubt. No other court has reverse engineered a conviction in this matter. The majority's holding cannot be squared with precedent, due process, or common sense. Therefore, I respectfully dissent.

It is only natural that the Supreme Court granted certiorari, vacated our decision denying Kleve's habeas petition, and remanded for reconsideration in light of *Fiore v. White*, 121 S.Ct. 712 (2001), because *Fiore* supports the obvious conclusion that Kleve's continued incarceration for a crime that does not exist violates due process. *See Kleve v. Hill*, 2000 WL 32463 (U.S.) (2001). *Fiore* held that where a state supreme court clarifies state law, due process prevents a defendant from being convicted "for conduct that its criminal statute, as properly interpreted, does not prohibit." *Id.* at 714. The majority's attempt to distinguish this case from *Fiore* is unconvincing. Kleve was convicted for conduct that California law, as properly interpreted, does not prohibit. Therefore, his continued incarceration violates due process.

Kleve was originally charged with conspiracy to commit first degree murder and two misdemeanor counts. The jury could not reach a verdict on the conspiracy charge and a new trial was ordered. During the second trial, the judge instructed the jury that it could find Kleve guilty of either conspiracy to commit first degree murder or conspiracy to commit second degree murder. First degree murder, they were told, requires a showing of intent to kill with premeditation and deliberation

whereas second degree murder requires only intent to kill.[1]

While Kleve's federal habeas petition was pending, the California Supreme Court held there is no crime of conspiracy to commit second degree murder under California law. *See Cortez*, 18 Cal.4th at 1232 n.3, 1237-38. In *Cortez*, the defendant was charged with murder and conspiracy to commit murder. The jury was not instructed that conspiracy to commit murder was divisible into degrees. *Id.* at 1226. The court held that the trial court did not err in failing to require the jury to determine the degree of the murder alleged as the target offense of the conspiracy. And there was no error in omitting premeditation from the conspiracy to commit murder instruction because premeditation could be inferred from the jury's finding that the defendant intended to conspire and intended to commit the target crime of murder. *Id.* at 1238.

Cortez did not establish, as the majority seems to assume, that premeditation is irrelevant to a conviction for

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[1] The trial court instructed the jury that every person who unlawfully kills a human being with malice aforethought is guilty of the crime of murder; that murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree; and that murder of the second degree is the unlawful killing of a human being where there is malice aforethought, but the evidence is insufficient to establish deliberation and premeditation. The trial court further instructed the jury that, if they should find the defendant guilty of conspiracy to commit the target crime of murder, they must state in their verdict whether they found the murder to be of the first degree or second degree; and that, if they were convinced beyond a reasonable doubt that the target crime of murder was contemplated by the defendant, but had a reasonable doubt whether such murder was of the first or second degree, they must give the defendant the benefit of that doubt and return a verdict of second degree murder. *See* Trial Transcript at 362-65.

conspiracy to commit murder. In fact, the court stated explicitly that it was not holding intent to kill is the only requirement for conspiracy to commit murder. In response to Justice Kennard's dissent, the *Cortez* court explained that the dissent

> misconstrues our analysis when suggesting we are concluding 'conspiracy to murder is a unitary crime requiring proof of only intent to kill, the mental state of second degree murder, but subject to the punishment for first degree murder.' . . . We are not concluding conspiracy to commit murder 'requires only intent to kill' — we are instead merely recognizing that the mental state required for conviction of conspiracy to commit express malice murder necessarily equates with and establishes the mental state of deliberate and premeditated first degree murder.

Id. at 1232 n.3. In other words, intent and premeditation are separate concepts; one can be inferred from the other, as the court did in *Cortez*, but they are not the same. While *Cortez* recognized that in most cases proof of intent supports an inference of premeditation, that inference is not supported when there is already a jury finding of no premeditation.

In this case, the jury was asked about premeditation and deliberation and found that it was lacking. The jury's verdict, therefore, undermines any inference that intent equates with premeditation. The majority seems to argue that we need not worry about the prosecution's failure to prove premeditation and deliberation beyond a reasonable doubt because the jury found Kleve guilty of conspiracy to commit murder. But we cannot stop there without also considering the jury's finding of no premeditation. Kleve was acquitted by a jury of the only lawful charge brought against him. He may not be held liable on

that same charge by using a conviction for a non-existent offense to override the verdict of acquittal. We have already held that a conviction based on a "theory of culpability that did not exist" violates due process. *See Suniga v. Bunnell*, 998 F.2d 664, 668 (9th Cir. 1993). By the same reasoning, a conviction for conduct that is not in fact a crime cannot be squared with the dictates of due process. *See Adams v. Murphy*, 653 F.2d 224, 225 (5th Cir. 1981) (reversing defendant's conviction for attempted perjury after Florida Supreme Court explained that there was no such offense under Florida law because "[n]owhere in this country can any man be condemned for a non-existent crime.").

The majority dismisses this concern by invoking *United States v. Powell*, 469 U.S. 57 (1984). *Powell* held that inconsistent jury verdicts do not warrant reversal because the inconsistency could just as easily stem from the jury's desire to exercise mercy by ignoring the judge's instruction as from a desire to punish the defendant. *Id.* at 65. The problem with the majority's analysis, however, is that the verdicts in Kleve's trial were perfectly consistent under the instructions as given; *Powell* is inapposite. The jury found insufficient evidence of premeditation and acquitted Kleve of conspiracy to commit first degree murder as a result, but convicted him of the lesser offense of conspiracy to commit second degree murder because premeditation was not an element of that offense. As I explained in my original dissent, "Rather than the petitioner attempting to use the jury's acquittal on one charge to invalidate the conviction on another, here the majority uses Kleve's conviction on one charge to invalidate the acquittal on another charge." 185 F.3d at 1015 n.2.